CLERK'S COPY. 19401

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 474. 167.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., APPELLANTS,

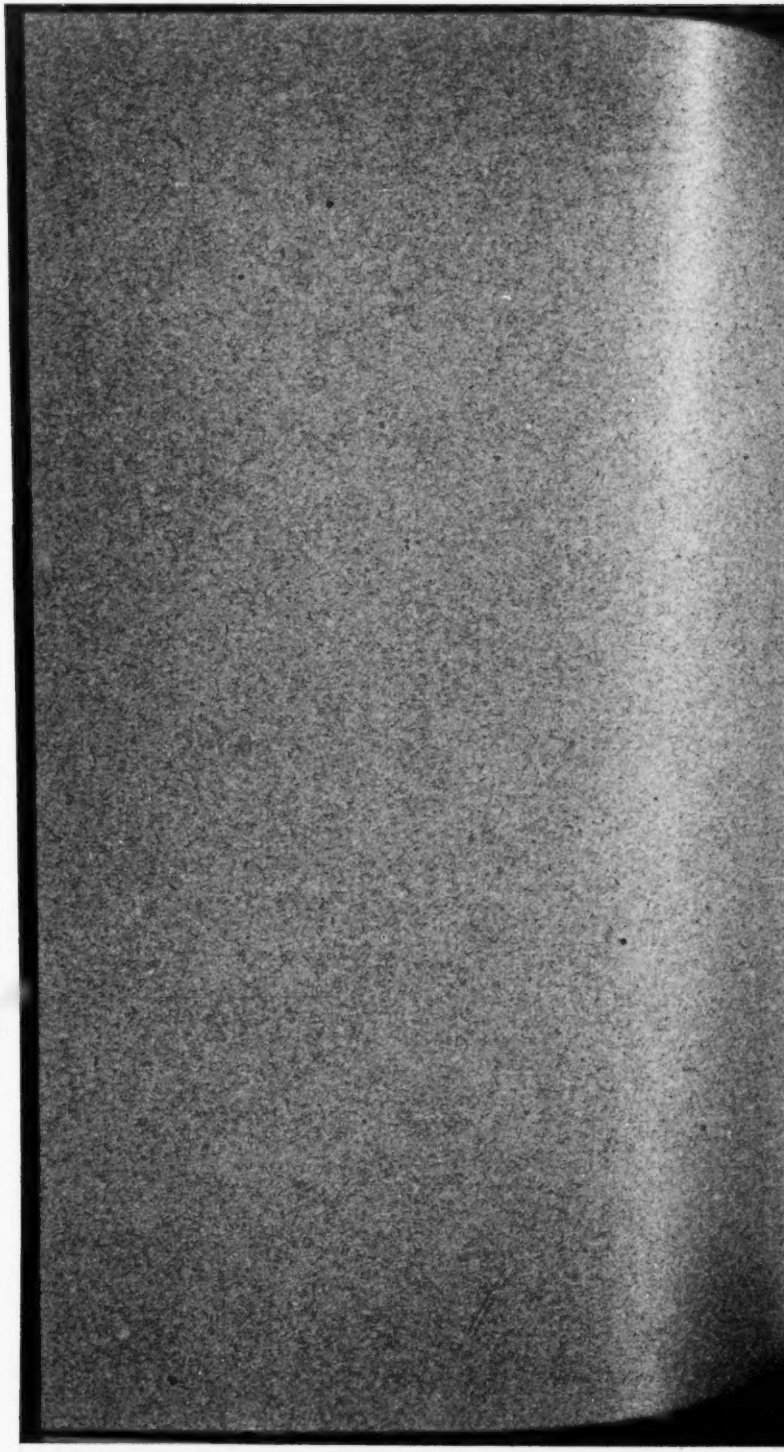
vs.

W. N. COLER & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED DECEMBER 15, 1899.

(17,585.)



(17,585.)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 10, 1900.

1 *Certified Questions of Law.*

Filed Nov. 17, 1899.

United States Circuit Court of Appeals, Fourth Circuit.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY *et al.*, Appellants,
vs.
W. N. COLER & COMPANY, Appellees.
No. 319.

Appeal from the circuit court of the United States for the western district of North Carolina, at Greensboro.

This is to certify that W. N. Coler & Company, of New York city, in manner and form as set out therein, filed their bill in equity in the circuit court of the United States for the western district of North Carolina, on the 22nd day of February, 1898, against The Board of Commissioners of Wilkes County and others of Wilkes county, North Carolina, alleging:

1. That the complainants, W. N. Coler, W. N. Coler, Jr., Bird S. Coler, James W. Campbell, and Francis W. Coler, are each
2 and every one, a citizen, and resident of the State of New York, and are bankers, under the name and style of W. N. Coler and Company; and the said complainants bring this their bill of complaint against The Board of Commissioners of Wilkes County, each and every member of said board being a citizen and resident of the State of North Carolina, and of the county of Wilkes, and within the western district of North Carolina; and also bring this, their bill of complaint, against Clarence Call, ex-sheriff and ex-treasurer of Wilkes county, and also against John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, within said district; and thereupon your orators complain and say:

1. That the matter in dispute exceeds, exclusive of interest and costs, the sum and value of two thousand dollars, this suit being to recover from the respondents, the sum of four thousand and two hundred dollars ($4,200.00) and to enjoin the respondents, from paying out, or in any manner disposing of, or interfering with, a sum of money, to wit: thirteen thousand dollars ($13,000.00), held by respondents, Clarence Call and John H. Johnson, sheriffs, and *ex officio* treasurers, as above set out, the said sum being amount due holders of coupons, interest on certain bonds, hereinafter mentioned, other than is directed by this court, the said sum of forty-two hundred dollars ($4,200.00) being due upon the coupons held by the complainants, the said coupons being the obligations of the said county, to pay the complainants said amount.

2. That your orators, under the firm name of W. N. Coler & Company, are engaged in the banking business in the city and State of New York, and as such, are buyers and sellers of municipal bonds.

3. That, as such, your orators bought, for valuable consideration, and for a large sum, the highest market price, a great number of bonds, to wit: fifty-five (55) county bonds of the denomination of one thousand dollars each, bearing interest, at the rate of six per centum, payable on the 1st day of April and 1st day of October, in each and every year. That the purchase of the said bonds was for value, in good faith, and without notice, express or implied, that there was any suggestion of their being void, invalid, fraudulent, or otherwise than perfectly legal, in their issue and sale.

4. That the total issue of bonds by the said county in pursuance of the authority and power conferred upon the board of com-
3 missioners of the same, and in pursuance of which power, the said bonds held by complainants were issued, as aforesaid, was in the amount of one hundred thousand dollars ($100,000), all of which bonds, as complainants are informed and believe, were sold, as aforesaid, and are owned, and have been in possession of *bona fide* holders, for value, without notice, and the interest on the same has been paid regularly at the times set out in this bill, for seven years, as complainants are informed and believe, the said bonds having been issued in the year 1889.

That a levy upon the property of the tax-payers of the county has been made, and the interest collected by the sheriff of the said county of Wilkes for each and every year, for eight years, as complainants, your orators, are informed and believe.

5. That the interest due and payable, as aforesaid, on about the first of April and October of each and every year, upon the bonds, held by complainants, as herein set out, is evidenced by certain coupons attached to said bonds, as follows, to wit:

2 coupons due April, 1896, from bonds Nos. 73 and 84..	$60 00
60 coupons due April, 1898, from bonds Nos. 4, 8, 9, 11, 13, 28, 31, 33, 37, 39, 43, 49, 56, 59, 63, 76, 78, 81, 83, 84, 86, 90.....	1,800 00
48 coupons due October, 1898, from bonds Nos. 4, 11, 13, 15, 17, 19, 21, 24, 28, 31, 33, 37, 43, 48, 56, 59, 63, 69, 72, 74, 76, 78, 81, 83, 85, 86, 88, 90.....	1,440 00
	$3,300 00

and the said sum is the interest due and still unpaid upon the bonds issued and purchased by your orators, complainants in this bill; and also the sum of nine hundred dollars, evidenced by other coupons in the hands of your orators and owned by them, the same attached to the said bonds. That the above sum your orators have demanded of respondents by presenting the said coupons, as has heretofore been done, when payment was made, at the fourteen times, as aforesaid.

6. That, although the said sum of thirteen thousand dollars, collected from the tax-payers of the said county, by reason of a levy made by the board of commissioners, in pursuance of the power conferred upon the same, is in the hands of the said respondents, the said sheriffs, *ex officio* treasurers of the said county of Wilkes,

for the purpose of paying the said interest, due and payable
4 on the 1st of April, 1896, on the 1st of April, 1898, and on the 1st of October, 1898, they, the said respondents, refuse to pay the same to the holders of the said coupons, your orators and complainants. That having received the said amount, for the purpose aforesaid, and only for that purpose, they, the said sheriffs, *ex officio* treasurers, and the respondent, The Board of Commissioners, under and by virtue of whose orders the said treasurers hold the said amount, have become trustees of the bond and coupon holders, between whom—your orators and them—there exists a relation fiduciary in its character, they, the said respondents, holding the said sum, for the use of, and in trust for, your orators, complainants, and for other bondholders, whoever, and wherever they are, or may be.

7. That as your orators are informed and believe, the reason the said *ex officio* treasurers of the county of Wilkes, have not accounted with complainants, as under the rules of equity and good conscience they are required to do, being, as they are, trustees, as aforesaid, is the fact, that the said board of commissioners, or its predecessors—the board of commissioners being a continuous body—sued out a certain process of injunction from one of the superior courts of North Carolina, within said western district, and caused the same to be served upon them, or the one of the said *ex officio* treasurers, holding the said sum, enjoining them, from accounting with the holders of any of the said bonds and coupons, and from paying over to them the interest due as aforesaid, which interest the board of commissioners has caused to be paid into the hands of the said *ex officio* treasurers, and to be held by them for the sole purpose of the payment of the said interest, due and payable as hereinbefore set forth.

8. That the proceedings in the said superior court of North Carolina, it being for the county of Wilkes, in which, this injunction was obtained, was begun in the name of the Board of Commissioners of said county, and, in the name of one C. C. Wright, an alleged tax-payer, as plaintiffs, against Clarence Call, sheriff, and *ex officio* treasurer of the county, as defendant, on the 23rd day of December, 1897. That the complainants, your orators, were not made parties to the same, nor was any other *bona fide* bondholder, made a party, as your orators are informed and believe. And your orators do further say, as they are advised and believe, that they, as such bondholders, are in no manner affected by the judgment or decree of the said State superior court, which granted the injunction, as aforesaid.

5 9. Your orators do further say that this proceeding in the State court was taken and commenced eight years after the issue of these said bonds, and purchase of the same, by complainants, your orators; and, as they are informed and believe, for the purpose of repudiating the honest debt of the county, contracted and made in good faith, by the said county, which received full value and consideration for the same. That, as your orators are informed and believe, the said respondents, The Board of Commis-

sioners, purposely avoided making the bondholders, your orators' or any other bondholders, parties defendants in the State court proceeding, to prevent a removal of the suit to the jurisdiction of this, the circuit court of the United States.

10. That, on the 18th day of February, 1898, the judge of the State superior court, signed an injunction order, "that *that* defendant, Clarence Call, sheriff, of Wilkes county, be, and he is hereby, enjoined, and restrained," from paying any portion of the moneys in his hands, to the coupon-holders, in discharge of the interest due and payable, as aforesaid.

11. That the defendant in the said proceeding, *Clarence Call*, excepted to the order of the said superior court, and appealed to the supreme court of North Carolina, from the same.

12. That, after the said order of injunction was issued, in the said State court, and after the appeal was taken by the said Clarence Call, sheriff, and *ex officio* treasurer, on motion of counsel for J. M. Turner, and J. M. Wellborn, and by consent of the plaintiffs, the said Turner and Wellborn, as the alleged owners of one of the bonds of the county of Wilkes, were allowed to make themselves parties to the said proceeding, as defendants.

13. That, on the 8th day of March, and after the time had expired within which, the said defendant, Clarence Call, sheriff, was allowed to serve his statement of case, on appeal, to the supreme court of North Carolina, the said Turner and Wellborn filed an answer, in the said proceeding, asking that their rights as bondholders, be adjudicated.

14. That, on the 22nd day of March, 1898, on motion of counsel for plaintiffs in the said proceeding, the said superior court adjudged that the bonds were void, the board of commissioners, not having the power to issue the same.

15. That, on the 9th day of November, 1898, the supreme court of North Carolina, affirmed the judgment of the said superior court.

6 16. That the said proceeding, in the State court, in which the said order of injunction was issued, was purely an *ex parte*, collusive one, as your orators are informed, advised and believe, it being, in the first instance, an action by a principal to prevent an agent from doing a thing which the latter could not do, without the order of the former. The said sheriff and *ex officio* treasurer is under the control of the county commissioners, as is prescribed in the Code of North Carolina, and could not pay money out, except by order of the board. That in this proceeding in the State court there were no adverse parties, and there could, under the laws of the State, be no action such as would authorize any court of the State, in the exercise of its jurisdiction, to take cognizance of.

16. That said Turner and Wellborn, as complainants are informed and believe, were no adverse parties in this proceeding, but were made parties defendants by the court, and at the instance of the plaintiffs in the same. That, as the complainants, your orators, are further informed and believe, they do not own the said bond,

as alleged in their answer, filed in the State court, but obtained the same for the purpose of becoming parties to the proceeding, and, to the end, that they might aid the plaintiffs in their effort to effect a repudiation of the said county bonds. That they avow, even now, as your orators are informed and believe, their purpose was, and is, to have these bonds declared null and void. That they did not appear in the supreme court, by counsel or otherwise, at the hearing of the appeal; nor did the defendant, Call, appear in said court. That, as your orators are informed and believe, the expenses incurred by the said Turner and Wellborn, in becoming parties to the said proceeding, have been paid by the commissioners for the county, and, although the defendants in the supreme court of the State, were adjudged to pay the costs of the proceeding, and execution for the same was issued against the said Turner and Wellborn, and their sureties on their appeal bond, yet, the same was paid by order of the county commissioners out of the funds of the county, in the sum of $24.30.

17. That, as your orators are further informed and believe, the said Turner and Wellborn have sued out a writ of error to *to* the Supreme Court of the United States, ostensibly for the purpose of reversing the judgment of the supreme court of North Carolina, in this proceeding, when really it is for the purpose, and to the end,

7 that the decree of this court, in this suit, now begun by your orators, may be anticipated. That, as your orators *and* informed and believe, the commissioners of the said county of Wilkes have agreed to pay the expenses, costs, &c., of suing out the said writ of error out of the county funds.

18. That your orators, complainants, are advised, and believe that there is no Federal question involved in the proceeding in the State court, and, upon inspection of the record in the same by the Supreme Court of the United States, the said writ of error will be dismissed.

19. That the North Western North Carolina Railroad Company, was chartered, by an ordinance of the constitutional convention of North Carolina, ratified the 8th of March, 1868, and published as chapter 17 of the ordinances of said convention. A copy of said ordinance is hereto attached, marked Exhibit A.

20. That, by virtue of said ordinance, the North Western North Carolina Railroad Company, was organized, on April 17th, 1868.

21. That, your orators are advised and believe that the bonds in the sum of one hundred thousand dollars, issued by the board of commissioners of Wilkes county, as set out in this bill, were legally issued, and authorized, by the original charter, granted by the convention in 1868, and by an act of assembly of the 11th of August, 1868, which is in the following words:

"SECTION 1. The General Assembly of North Carolina do enact that an ordinance entitled 'An ordinance to incorporate the North Western North Carolina Railroad Company,' ratified the 9th day of March, A. D. 1868, be and the same is, hereby re-enacted, ratified and confirmed:" and also, by sections 1896 and 1897 of the Code of North Carolina: and also, by an act of the General Assembly of

North Carolina ratified 20th day of February, A. D. 1879, entitled an "Act to amend the charter of the North Western North Carolina railroad, for the construction of a second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county." Also by act of March 2nd, 1881, Exhibit G, hereto attached. Copies of these acts and sections of the Code, are attached hereto, and marked B, C, D and E.

22. That the county of Wilkes, acting through its board of commissioners, and in accordance with the ordinance and acts, as above set out, subscribed the sum of one hundred thousand dollars to the capital stock of the North Western North Carolina Railroad Company, the proposition to subscribe the said amount having
8 been submitted to the qualified voters of the county, at an election held according to law, and a large majority of the said qualified voters, having voted in favor of the same.

23. That in return for, and in consideration of, said subscription, the said North Western North Carolina Railroad Company issued to the county of Wilkes, stock in, and to, the amount of one hundred thousand dollars, which stock the said county now holds, as your orators are informed and believe, and has held, since the issue of the said bonds, in the year 1889. That the said county, by reason of the holding of the said stock, has been represented on the board of directors of the said company, and continued to be until the said sale of the road was made, by decree of this court, in 1894. That the county of Wilkes long desired the completion of this railroad, and by reason of the same, has received great benefit, in the increased value of the lands of the county, and transportation facilities, for freight and passengers. That this railroad is the only one running within the limits of the county, and has been taxed by the county, each and every year since its construction.

24. That the said bonds, hereinbefore *delivered* and set out, were issued to the corporation by the said county on or about October 1st, 1889, in payment of the said subscription. A copy of the bond is hereto attached, it being one of the series issued, and is marked F.

25. That after the issue of the said bonds to the North Western North Carolina Railroad Company, they were duly exposed to sale, by said company, and your orators bought, as hereinbefore set out, those which they now hold, paying for them a large sum of money, the highest market price.

25*a*. That the validity of the bonds of the county of Forsyth, similar to the said bonds of the county of Wilkes, issued under the ordinance of the convention of 1868, has been upheld, by the supreme court of North Carolina in two cases, to wit: Hill *vs.* Commissioners of Forsyth County, 67 N. Car. R., 367, and Belo *vs.* Commissioners, &c., 76 North Carolina Rep., 489. That this ordinance of the convention of 1868, is the one, incorporating the North Western North Carolina Railroad Company.

That the complainants, your orators, purchased these bonds, relying upon their being legal and valid obligations of the county of Wilkes; that, at the time of their issue and purchase, these bonds,

and like bonds of other counties, were regarded and treated
9 as valid securities by the corporate authorities of the county of Wilkes, and other counties of the State; that they were so regarded and treated by the public, by the legal profession, and by the legislative, executive and judicial departments of the State. That the decisions of the supreme court of the State before, at the time of, and since, the issue of the said bonds until 1897, appear to have assumed the validity of these bonds. That there was in North Carolina, a settled course of decisions of the court from 1870 to 1897, construing the constitution and statutes of the State, in favor of the validity of these bonds and like bonds. That there was an action begun in the county of Wilkes some years ago, as your orators are informed and believe, for the purpose of invalidating these bonds, and abandoned. That there never has been a pretence on the part of any one that these bonds were not issued in good faith, and that the county of Wilkes did not receive full value in return for same.

26. That the sheriff of the county of Wilkes, and *ex officio* treasurer, and ex-sheriff and *ex officio* ex-treasurer of the said county, and board of commissioners are, as your orators are advised, contending with one another for the possession of this sum of money, to wit: thirteen thousand dollars, which is in the hands now of the ex-sheriff, Clarence Call and John H. Johnson, sheriff and treasurer; and, unless restrained by the order and decree of this court, will make away with, or dispose of, the said sum, as your orators are advised, having refused to pay over the same, as received, and by such refusal, the said parties, respondents, have committed a breach of the trust reposed in them, and ignored their obligations, as hereinbefore set out. The amount due your orators is defined, set apart, and an acknowledged debt, in its nature accompanied by a right to the appropriation of the said sum, in the hands of the respondents, for its payment, your orators having an interest in the said sum and a lien thereon, under the conditions hereinbefore recited.

27. That, as advised, your orators say they are entitled to have an account stated between them and the respondents, to ascertain the condition of the sum held by respondents for them; and to ascertain what they are to receive upon their coupons; and they are further advised that, according to the rules of this court, they are entitled to have an injunction upon the said respondents against disposing of the said *said* sum or any part of the same, in any other manner, than under the decree of this court; and, further, to have a receiver appointed to hold the said sum, as the agent and officer of this court.

10 Wherefore, the premises considered, your orators pray:—

1. That this honorable court enter a decree compelling the taking and statement of an account as set out in this bill; that an injunction issue upon the respondents, as set out in the bill, also; and that a receiver be appointed as set out therein.

2. That, if, in the opinion of this court, after reading the foregoing bill it shall be deemed advisable to do so, notice be issued to J. M. Turner and J. M. Wellborn to show cause why they should

not be made parties to this suit, and requiring them to answer on oath as to the truth of the allegations and charges made against them in this bill.

3. That, if, in the opinion of this court, it shall be deemed advisable, notice be issued to all bondholders having an interest in the said sum to appear and file with the master, the receiver, their coupons, to the end that their rights may be ascertained, and amounts due them stated in the account, to be taken.

4. That not only a writ *of injunction*, conformably to the prayer of this bill be issued, and receiver be appointed, but, also, a writ of subpœna of the United States of America, directed to the Board of Commissioners of Wilkes County and Clarence Coll, ex-sheriff and ex-treasurer, and John H. Johnson, sheriff and treasurer of said county, commanding them on a certain day to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper, and required by the principles of equity and good conscience.

5. That, if in anything your orators are mistaken in the relief prayed for, then they pray for all such other, further and general relief as the premises may warrant, and the rules of equity allow.

To this bill of complaint the respondents filed the following answers:

The Board of Commissioners of Wilkes County, the above-named respondents, reserving to themselves the right to demur to the jurisdiction of the court, for answer to the bill of complaint of the plaintiff-, says:

1.

That in answer to the first paragraph of the bill of complaint, these respondents say that they have no knowledge or information sufficient to form a belief as to the allegation that the plaintiffs are the holders of what purport to be the bonds of the county of Wilkes; but if it be true that they had such papers, these respondents are advised by counsel, and therefore allege that they are invalid for want of authority of law in the Board of Commissioners of Wilkes County to issue such bonds or create a bonded indebtedness against said county under either the statute recited as authority in the face of such pretended bond, or by virtue of any power conferred by any other acts of the General Assembly of North Carolina relied upon by the complainants to sustain their authority.

2.

That the allegations contained in paragraph second of the bill of complaint are, as respondents are informed and believes, true.

3.

That respondents have no knowledge or information sufficient to form a belief as to the price paid by the complainant- for bonds; but respondents deny the truth of the allegation that such bonds were purchased without notice express or implied that they were void and invalid, and aver that there was

no act of the General Assembly of North Carolina which authorized the Board of Commissioners of Wilkes County to create such bonded indebtedness. Respondents especially aver that the amendments to the charter of the North Western North Carolina Railroad Company are void for the reason, that they were not enacted in accordance with the mandatory requirements of article 2, section 14 of the Constitution of North Carolina, including in the amendments to which this foregoing averment applied, not only those enacted by the General Assembly at its session of 1879 and 1881, respectively, but also to the amendments of said charter enacted at the special session of 1868 of the General Assembly of North Carolina, and in reference to said last-named amendment, respondents aver that, if it had not been invalid because not enacted in accordance with said requirements, it nevertheless upon its face failed to confer or purport to confer any authority to issue bonds or to lay a special tax to pay the same other than to the county of Forsyth. These respondents further aver that the original charter of the North Western North Carolina Railroad Company was enacted as an ordinance of the constitutional convention of 1868 and went into effect and became operative before the ratification of the constitution framed by said convention on the 24th of April, 1868, for the reason that certain restrictive clauses contained in articles 5 and 7 of said constitution, limited the powers of the counties and other municipal corporations by proscribing conditions precedent to the exercise of authority by them to create such bonded indebtedness and rendered it necessary that new enabling acts should be passed by the General Assembly after the ratification of the constitution on said 24th day of April, 1868, in order to clothe such municipal corporations with power to create such indebtedness, as respondents are advised.

4.

These respondents admit that the Board of Commissioners of Wilkes County issued without authority of law what purported to be bonds to the amount of one hundred thousand dollars ($100,000), and aver that said bonds were issued without authority of law, and that all purchasers of such bonds are required to look to the legal authority for their issue and in contemplation of law were charged with the nature of the said insufficiency of the statutory authority relied upon.

12 Respondents admit that interest on said bonds was paid for eight years, but deny that, as respondents are advised, the payment of interest on such void bonds can impart validity to them.

5.

Respondents have no knowledge or information sufficient to form a belief as to the allegations contained in the 5th paragraph of the bill of complaint and therefore demand strict proof.

6.

These respondents admit that no interest has been paid by the county of Wilkes on the said pretended bonds since December, 1897, but deny the allegation therein contained that the defendants, The Ex-Treasurer and the Treasurer of Wilkes County, sustained a fiduciary relation to the complainants or that such relation exists between these respondents and the complainants, as respondents are advised and believe.

7.

These respondents, still denying that fiduciary relation exists, admit that their predecessors in office, whose term expired on the first Monday in December, 1898, did bring an action to enjoin Clarence Hall, then *ex officio* treasurer of Wilkes county, and that an order of injunction was granted in the superior court of Wilkes county, which upon a subsequent appeal to the supreme court of North Carolina was held to be the proper exercise of the extraordinary powers of the court, and that it appeared in said action that there was fund in the hands of said treasurer, collected under a levy made for the purpose of paying the interest on such pretended bonded debt semi-annually.

8.

These respondents admit that said action was brought in the name of the Board of Commissioners of Wilkes County and C. C. Wright, a tax-payer, but upon information and belief deny the allegation that no bondholder was made a party, and aver, upon information and belief, that one J. M. Turner and J. M. Welborn were on motion made defendants in this action, and claiming as the holder of one of the said pretended bonds, and after inviting all other holders of such bonds to join with them, appealed from an adverse judgment of the superior court of Wilkes county to the supreme court of North Carolina, upon the hearing of which appeal it was adjudged that the said bonds were invalid.

13 9.

Respondents aver that the action in the State court referred to in the 9th paragraph of the complaint was brought by their predecessors in office, but, as respondents are advised and believe, the said action was brought under the advice of counsel that the said bonds were void *ab initio*, for want of lawful authority to issue them, and that all purchasers are charged with notice of such defect of power, and that it was a refusal to pay an invalid debt, not a repudiation of a valid obligation, and respondents are advised that the supreme court of North Carolina, by its adjudication in said action, sustained the contention of their predecessors.

Respondents have no information as to the motives which induced their predecessors in office to bring said action in the courts of the State of North Carolina, but are advised that citizens of the State are not required to apologize for seeking redress or protection from

any courts of competent jurisdiction. Upon information and belief, respondents aver that the counsel for their predecessors in office would, when said action was brought, have made any bondholders who could be reached by the process of said courts parties defendant, if they had known of any such holders.

10.

Respondents admit the truth of the allegations, contained in the tenth (10) paragraph of the complainants' complaint.

11.

Answering the eleventh paragraph of the complaint, these respondents admit that on the 18th day of February, 1898, the Hon. Henry R. Starbuck adjudged after a hearing upon an order to show cause, that the defendant therein, Clarence Call, should be enjoined and restrained until the final hearing of this cause from paying any portion of the interest on the bonds in controversy, and respondents further admit and aver that on the 18th day of February, 1898, the said Starbuck, judge, as aforesaid, entered upon the back of said restraining order, or injunction, the following memorandum or order of appeal:

"To this judgment defendant excepts, 15 days *allows* defendant to serve statement of case on appeal and 10 days thereafter allowed pl'ff to serve exceptions or counter-statements. Appeal bond fixed at $100. H. R. Starbuck, judge."

14 Further answering said section 11 of complaint, these defendants aver that under the provisions of 550 of the Code of North Carolina, the defendant, Call, as they are advised, would have been allowed but ten days from the entry of appeal taken on said 18th day of February to prepare and serve his statement of case on appeal but for the stipulation of opposing counsel to agree to 15 days, but, as respondents are informed and believe, and are advised, before the expiration of the said 15 days from said 18th day of February, Lindsey Patterson, Esq., counsel for the said Clarence Call, sheriff and *ex officio* treasurer as aforesaid, notified A. C. Avery, of counsel for the plaintiff in said action, that he, the said Patterson, would not perfect or prosecute said appeal, and that, as respondents are informed and believe, the said Patterson notified said Starbuck, judge, before the expiration of the said 15 days of his purpose to abandon such appeal, and that the said Starbuck informed the said Avery that the said Patterson had so communicated his purpose to him. Respondents further answering said last-named paragraph, say that, as they are informed and believe, on the 7th day of March, 1898, at the spring term of the superior court of Wilkes county, and after the expiration of the said 15 days from the said 18th day of February, and before any motion was made for a final judgment, the said J. M. Turner and J. M. Welburn moved the said court, as the owners of one of the bonds in controversy, to be allowed to become parties defendants, and said order was on the same day allowed by Coble, judge, presiding, and was filed on the 18th of March, 1898, upon which day also the said Turner and

Welburn, in pursuance of said order, filed their answer in said action.

Further answering said last-named paragraph of bill of complaint, these respondents aver that, as they are informed and believe, on said 8th day of March, 1898, the counsel for the plaintiff in said action, and R. N. Hackett, counsel for the defendants, Welburn and Turner, upon a suggestion of the Hon. Albert Coble, judge presiding, that he was the brother-in-law of the said J. Lindsey Patterson, who was not only counsel for the said Clarence Call, but was also counsel for his stepmother and the stepmother of the wife of Judge Coble, and that the stepmother, Mrs. Patterson, was the holder of several thousand dollars of said Wilkes County bonds, agreed that the said Coble might make a consent order that a motion which had been made on the filing of said answer on behalf of said Turner and Welburn to vacate the restraining order theretofore made by said Starbuck, at chambers, might be heard before said Starbuck, judge, and that thereupon the said motion was heard by the said Starbuck at chambers, at Morganton, on the 22nd day of March, 1898, and that from a refusal of this said motion the defendants, Turner and Welburn, appealed to the supreme court of North Carolina, upon the hearing of which appeal the said bonds were adjudged to be void and invalid, as aforesaid.

12.

That for answer to the 12th paragraph, these respondents refer to the averments above set forth in answer to paragraph 11.

13.

These respondents admit that the defendants, Turner and Welburn, were allowed, as aforesaid, to file an answer after the expiration of the time allowed said Call, but respondents are advised that the said answer was filed in accordance with the established practice of the said courts before any final judgment had been prayed, or any final judgment had been entered in this action.

14.

Answering the 14th paragraph of the complaint, these respondents admit that the superior court adjudged upon the hearing that the bonds were void for want of power in the commissioners to issue them.

15.

That the allegations contained in the 15th section of the complaint are admitted to be true.

16.

These respondents are advised by their counsel that the legal opinion contained in the 16th paragraph of the bill of complaint, to the effect that the said action was a proceeding instituted by a principal against an agent, is erroneous, and in conflict with the opinion of the supreme court of North Carolina construing its own

statutes, and in defining the duties and powers of its own officers thereunder, as appears in the opinion of Board of Education *vs.* Commissioners, 113 North Carolina, at pages 379, 388, 389. These respondents deny the allegations that there was no adverse party to said action, and aver that, had the said Call paid out the funds in his hands levied for the purpose of paying the interest on said bonds to the holders of the said bonds contrary to the orders of the said commissioners of the county of Wilkes, — would not, as
16 respondents are advised by counsel, have had any redress under the law as construed by the supreme court of the State against said treasurer officially or upon his bonds. Further answering, the respondents say that they are advised that the supreme court of North Carolina passed upon an appeal in a similar case brought for a similar purpose, wherein the only parties were the commissioners of Stanley county, as plaintiffs, and the treasurer of said county, as defendant, and that it was the duty of the said court, of its own motion, to dismiss where there was a want of jurisdiction, and these respondents are advised that the said court, in legal contemplation, gave its sanction to the right to maintain said action against said treasurer.

That these respondents have no personal knowledge as to whether the said Turner and Welburn are or not the owners of the said bonds, but are informed and believe that the said Turner and Wellburn are ready to file affidavits that they are the *bona fide* owners of the bond claimed by them, and, upon such information and belief, these respondents aver that they are such true owners. These defendants have no knowledge or information as to the purpose of the said Turner and Welburn in making themselves parties to said action, and, therefore, hold the plaintiff to strict proof of the allegation that their purpose was to effect a repudiation of said bond.

Further answering the said last-named paragraph of the bill of complaint, respondents say that the said Clarence Call, after the expiration of his term of office as sheriff, being still *ex officio* treasurer of Wilkes county, appear*ing* before two of these respondents, to wit: Leander Jennings and William Barlow, in the absence of the chairman of the board, John T. Peden, at a meeting held soon after their induction into office, and exhibited the execution for the costs of the said appeal to the supreme court of North Carolina, and insisted that the said judgment was against him, Call, as well as against said Turner and Welburn, and insisted that it was the duty of the respondent board to pay said execution, and the said Call insisted, among other things that he, as treasurer, was a party to said action, that it was the duty of the commissioners to hold him harmless, and that he had the promise of the old board that he would be subjected to no costs, and that he had paid the bill of costs presented, and demanded credit for said payment on the settlement which he was then making, and, thereupon, the two respondents above named, under a mistake as to their official duty, and not through any wrongful or collusive purpose, consented to allow the amount of the said superior court judgment which had been thereto-
17 fore paid by said Call, to be a credit in his favor in said settle-

ment with him as sheriff and tax collector, and respondents understood their counsel to assent to the allowance of said credit.

17.

Answering section 17 of the bill of complaint, these respondents say that it is true, according to their information and belief, that the said Turner and Welburn have sued out a writ of error to the Supreme Court of the United States, but it is not true that these respondents have entered into any agreement with the said Turner and Welborn to pay the costs of suing out the said writ of error out of the county funds as alleged, and these respondents have no knowledge or information sufficient to form a belief as to the making of any agreement by their said predecessors in office to pay any such costs.

Further answering said section of the bill of complaint, these respondents say that it is a matter of law for the court to determine whether there is a Federal question involved in such appeal, and respondents are advised that all judges of the circuit court of the United States are not only willing but anxious to be anticipated in passing upon controversies by a court whose adjudications are the supreme law of the land and are more than willing that the law's delays should be prevented by such speedy adjudication.

18.

19.

That these respondents admit that the North Western North Carolina Railroad Company was chartered by the constitutional convention of North Carolina in 1868, as alleged in complaint.

20.

That those respondents have no knowledge or information sufficient to form a belief as to the time when the North Western North Carolina Railroad Company was organized, and therefore hold the complainants to strict proof as to the allegation that said company was organized April 16th, 1868.

21.

Answering the section of the bill of complaint mentioned 21 in the copy of the bill of complaint served on them, these
18 respondents say that neither the act ratified on the 11th day of August, 1868, nor the act ratified on the 18th day of February, 1879, nor the act of March 2, 1881, mentioned in the said section of the complaint, were enacted in the manner prescribed by section 14, article 2 of the constitution of North Carolina, and every one of the said acts is null and void by reason thereof, and constitutes no authority for the issue of said bonds. The said ordinance of the convention of 1868 is not re-enacted or ratified or confirmed by said void act, because of said defect in the manner of its enactment, and the said original charter fails to confer the authority

to create such bonded debt, because it was not supplemented by the enactment of any valid, enabling act as an amendment to said original charter, as these respondents are advised by counsel. Further answering said section, these respondents say that the sections of the code attached to the bill of complaint and marked Exhibits B, G, D and E do not constitute lawful authority for issuing said bonds, because said statutes are not local and special, as required by sections 1, 6 and 7 of article 5 of the constitution of North Carolina, and are insufficient as authority for issuing said bonds, and respondents say further that said sections of code failed to authorize the issue of said bonds, because said Northwestern North Carolina railroad was not within the meaning and proper construction of section 1996 of the Code, one in which the citizens of the county of Wilkes had an interest, nor was the subscription made necessary to aid in the completion of the same.

Further answering said section, these respondents aver the said bonds each contained a recital upon its face (as will appear from an inspection of Exhibit F, attached to complaint) that the said bonds were issued by virtue of authority conferred by the act of February 20th, 1879, which is for the reason aforesaid null and void and no law. These respondents, therefore, aver and plead that, as they are advised, the complainants are estopped from claiming that they were issued by any other authority or pretended authority than the said void statute.

22.

These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the capital stock to the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription and that it is now too late to question said finding as to said vote.

19 23.

These respondents admit that the said company issued certificates, as alleged, of stock to the county of Wilkes, but aver that, according to their best information and belief, the franchise and property of the said company were heavily mortgaged for the completion of the road to Wilkesboro, and from the date of said certificate of stock, and the said mortgages were foreclosed, as alleged in the complaint. Further answering said section, respondents are advised that it is not material that they should give their opinion as to what the county of Wilkes long desired, if it can be truly said of a municipal corporation that it is capable of desiring improvements.

24.

Section 24 of the complaint is admitted to be true.

25.

That respondents have no knowledge or information sufficient to form a belief as to the truth of the allegation contained in section 25 of the complaint, and, therefore, hold the complainants to strict proof.

25*a*.

Answering the section of the complaint mentioned in the copy served on these respondents as 25*a*, these respondents say that the questions involved in this controversy were not adjudicated either in the case of Hill *vs.* Commissioners of Forsyth County, 67 N. C., 367, nor in Belo *vs.* Commissioners, 76 N. C., 489, for the reasons:

1st. That the contract of subscription between the said county of Forsyth and the North Western North Carolina Railroad Company was a completed contract before the ratification of the said constitution of 1868 on the 24th day of April, 1868, and no enabling act was necessary under restrictive clauses of said constitution not then in force.

2nd. Because it did not appear in evidence on the trials of said cases that the said act of August 11th, 1868, had not been passed in accordance with the requirements of the constitution, section 14, article 2, and was, therefore, void. Further answering said section, these respondents say, that, as they are advised by counsel, neither the payment of interest on these bonds by the county of Wilkes nor the acknowledgement of its governing authorities, the commissioners, was sufficient to impart validity to bonds for want of authority to issue them or to relieve the purchasers of the duty of looking to the authority under which they were issued.

These respondents especially deny that, as they were advised by counsel, there was any adjudication or decision in the supreme court of North Carolina construing the constitution and statutes of said State so as to create a rule of property before said bonds were issued in the year 1889, which can be invoked, notwithstanding the later decisions of said court, but, as they are advised, the allegations that there were any such decisions contained in said section, are not true.

26.

That it is true that John H. Johnson is the present sheriff and that Clarence Call is treasurer until September, 1898, by reason of having received the tax-lists of 1898 before said Johnson was elected and qualified as sheriff, and it is admitted that an action has been brought by these respondents against the said Call and his sureties upon his official bond to recover not only a portion of the said tax fund levied to meet the interest on said bonds, but also the general tax. Further answering the said section, these respondents say that they are informed and believe and advised by counsel that one J. Gordon Hackett had been appointed by virtue of an order in the said action carried as aforesaid by a writ of error to the Supreme Court of the United States and receiver was ordered to take charge

of all of the said fund collected by virtue of such levy to meet the interest of the said bonds, and had qualified as such receiver before the bill of complaint was filed in this cause, and respondents are advised that this court has no jurisdiction of the said fund, has no authority to make any order as to the jurisdiction of the same since it was in contemplation of law, in custody of the superior court of Wilkes county before this suit was brought.

27.

That respondents are advised that the question whether the complainants are entitled to the relief demanded in section 27 of the complaint is one of law, and, under advice of counsel, respondents deny the right of complainants to such relief.

28.

Further answering the bill of complaint, these respondents say that they have acted in reference to said bonds and the tax levied for their payment in perfect good faith, and, in order to pro-
21 tect all parties, had entered upon their minutes before the bringing of this suit an order forbidding the defendant, Johnson, *ex officio* treasurer of Wilkes county, from paying out any portion of the said fund collected under the levy to meet the interest on said bonds, as aforesaid, and that said Johnson, treasurer, has now in his hands about seven thousand one hundred dollars of said fund.

A. C. AVERY.
T. J. DULA.
FINLEY & GREEN.

W. F. Barlow, a member of the respondent Board of Commissioners, being duly sworn, maketh oath that the facts stated in the foregoing answer, as of his own knowledge, are true and that those facts stated therein on information and belief, he believes to be true.

W. F. BARLOW.

Sworn to and subscribed before me this the 3rd of April, A. D. 1899, as witness my hand and official seal.

[SEAL.] L. BUMGARNER, *C. S. C.*,
By H. T. SMOOK, *D. C.*

Endorsed: Filed in this office April 18th, 1899. Sam'l L. Trogdon, clerk.

Supplemental Answer of the Board of Commissioners of Wilkes County.

UNITED STATES OF AMERICA:

In the United States Circuit Court, Western District of North Carolina.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. CAMPbell, and Francis B. Coler, under the Name and Style of W. N. Coler & Company, Complainants,

versus

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARence Call, ex-Sheriff and *ex Officio* & ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes Co., Respondents.

22 The defendants, The Board of Commissioners of Wilkes County, now, and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and the imperfections in the said bill contained, for further answer thereto, or to so much thereof, as these defendants are advised is material or necessary for them to make answer to, answering, in addition to the answer hereto verified but filed at the hearing with this supplement, says:

1.

Further answering the said bill of complaint, this defendant says that it is informed and believes that the action entitled "The Board of Commissioners of Wilkes County and C. C. Wright *versus* Clarence Call and others" referred to in the bill of complaint as having been adjudicated in the supreme court of North Carolina, had before the filing of the said bill been carried by writ of error to the Supreme Court of the United States, has since held that the Federal courts are bound to follow the adjudications of the State courts in that case, and affiant is advised by counsel that if such has been adjudication of said court the holders of one of the bonds in controversy having been parties to said action, the question involved in this cause and set forth in the bill of complaint as the plaintiffs' ground of complaint having been adjudicated, *and* the plaintiffs are estopped from denying that the bonds in controversy are invalid for want of authority in the said board of commissioners to issue them, and this defendant is further advised, informed and believes that after said action had been carried by writ of error to the said Supreme Court, and while it was there pending the superior court of Wilkes county, in the exercise of its rightful jurisdiction, and to the end that the fund mentioned in the bill of complaint as collected under a special levy to meet the interest on the bonds in controversy and as being in the hands either of the defendant Call or the defend-

ant Johnson be protected and preserved to await the orders of the court to be made in pursuance of the adjudication of the Supreme Court of the United States, made, upon petition in said action, an order, which was signed by Starbuck, resident judge of the judicial district in which Wilkes county is situated, and having rightful jurisdiction in the premises, by which order it was adjudged that Gordon Hackett *the* appointed receiver to take charge of and hold under the direction of said superior court all funds that might be collected by the tax collector of Wilkes county as a special tax to meet the interest on said bonds. (A copy of the record in said case, including said order appointing a receiver, is hereto attached marked Exhibit K.)

23 2.

And this defendant is advised, informed, and believes that, upon the making of said order, the said superior court acquired jurisdiction to appoint a receiver and to control the said fund as collected, and to hold the same subject to the action of said higher court, and this defendant, therefore, being so advised, specially avers and pleads that this court has no jurisdiction to appoint a receiver, because the said court, which is one of concurrent jurisdiction, had already assumed control of the said fund before the bill of complaint was filed.

And this defendant is further advised, informed and believes the question and issues involved in this controversy and set up as a cause of action, or the grounds of the suit in the bill of complaint, *has* already been adjudicated finally by the Supreme Court of the United States upon the hearing on the said writ of error, in which action the holders of one of said bonds had made themselves parties and had invited all other holders of said bonds to join them as parties defendants, and that said adjudication has been made since the same bill of complaint was filed, and this defendant specially avers and pleads that the plaintiffs are estopped by the said adjudication and will be finally estopped by the rendition of a final judgment in the superior court of Wilkes county upon the coming down of the certificate therein, and this defendant prays the court to continue the case until the coming down of said certificate, to the end that he may be enabled to properly plead as a defense that the questions and issues involved in this controversy have been so finally adjudicated and that the plaintiffs are estopped.

3.

Further answering the said bill of complaint, this defendant says that it is advised, informed, and believes that the bonds in controversy were issued and the debt apparently evidenced thereby was created without authority of law by the predecessor in office of the present Board of Commissioners of Wilkes County — is involved, and this defendant is ready to surrender and orders a surrender of the certificates of stock issued to it by the North Western North Carolina Railroad Company, which has always been worthless, because of a mortgage executed contemporaneously with its issues.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill
24 charged, without this, that there is any other matter, cause, or thing, in the said plaintiffs' said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

A. C. AVERY,
T. J. DULA,
FINLEY & GREEN, *Attorneys.*

Answer of Clarence Call.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

W. N. COLER ET AL.
vs.
THE BOARD OF COMMISSIONERS OF WILKES County, Clarence Call, ex-Sheriff, *et al.* } Answer of C. Call.

Clarence Call, *answer* the complaint in the above-entitled cause, says:

1. That paragraphs 1, 2, 3, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 19, 20, 22, 23, 24 & 27 are true.

2. That paragraphs 5, 8, 21 & 25 — supposed to be true.

3. That paragraph 16 is not denied, except the charge of collusion between this affiant and the plaintiff in the injunction proceedings in the State courts, which is denied.

4. That this defendant can neither admit nor deny paragraph 16, but says, in reply thereto, that after the injunction proceedings had been heard by Judge Starbuck, that this defendant concluded he would not perfect his appeal—said decision being in favor of the county, and believing that said judgment would stand till reversed, thought it best for the county that he should not appeal, and shortly thereafter, to his surprise, the counsel for the county of Wilkes, in said suit, wanted him to appeal to the supreme court of North Carolina, and when he declined was offered to be indemnified against any cost he might incur by reason of said appeal, including his attorney's fee for arguing said case in the supreme court, and it was after this defendant's positively refusal to carry up said appeal that Welborn and Turner, by some means unknown to this defendant, became parties to said proceedings, and an appeal by them was perfected, and the case carried to the supreme court of North Carolina, and while Judge Starbuck's decision was affirmed, the cost of said appeal was paid by Wilkes county. That this defendant was

treasurer of Wilkes county for four years, and that he never heard of Welborn or Turner owning a county bond till about the time they became parties to said suit.

5. That this defendant can neither admit nor deny paragraph 17, but says, in reply thereto, that while the county of Wilkes, in addition to attorneys' fees, was to pay expenses of said attorneys in conducting said suit, and while said expense accounts had from time to time been filed, and allowed, and paid, at a special meeting of the Board of County Commissioners, in November, 1898, an order was passed allowing Judge Avery $600.00 for expenses without filing any expense account, and when no expenses were then unpaid, said sum of $600 to be paid out of any funds in the treasurer's hands, except school funds and State taxes, and a claim was issued for said $600.00, and a demand was made on this defendant while treasurer of Wilkes county to pay said claim out of the bond fund then in his hands. That on the 1st Monday in December, 1898, a new board of commissioners took charge, and at their meeting in January, 1899, rescinded the $600 allowance to Judge Avery for expenses, and directed that notice be given to counsel to file itemized statement of said expenses, and at the February, 1899, meeting, the counsel for the county advised the county commissioners that, if forced to file an itemized statement of where the $600 was to be used, that it would show their *bond* to the bondholders, and could not at that juncture afford to do so, as this defendant is informed and believes, and whether for this cause or another, the order of $600 was reinstated and now stands on the claim book of Wilkes county, and affiant believes that, but for the temporary order issued in this cause, that said $600 would have been paid out of the bond funds. And defendant further says that, in conversation with P. A. Lomax, former chairman of the board of commissioners, affiant asked said chairman why they allowed the $600 without any account being filed therefor, and said chairman replied, "for reasons best known to ourselves."

6. That in answer to paragraph 26, this defendant says there is now no controversy between the parties therein referred to—this defendant has paid to his successor in office, J. H. Johnson, all of the bond fund, except the levy made in 1898, and this sum he is ready to pay when due, and while this defendant does not believe that his codefendants, of their own motion, would make way with the bond fund, still, unless restrained by this court, orders will be continually drawn upon J. H. Johnson, treasurer, or J. G. Hackett, State court receiver, and a good portion of this money will go in this way.

And this defendant, having fully answered, asks that such order be signed by your honor as will clearly define the duties of the defendants during the pendency of this litigation—such an order as will be a protection to the county officials, as well as to the bondholders.

Personally appeared Clarence Call, and makes oath that the facts set forth in the foregoing answer are true, except as to the matters

stated on information and belief, and as to those matters he beli-ves — to be true.

(Signed) C. CALL.

The defendant, John H. Johnson, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and the imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised is material or necessary for him to make answer to, answering says:

1.

That he has read the answer of his codefendant, The Board of Commissioners of Wilkes County, and that he is informed and believes the matters of defense and the facts stated in said answer are true, and this defendant adopts the said answer and prays that it may be treated as his own answer to each and every section of the bill of complaint.

2.

Further answering the said bill of complaint, this defendant says that he is informed and believes that the action entitled "The Board of Commissioners of Wilkes County and C. C. Wright *versus* Clarence Call and others," referred to in the bill of complaint as having been adjudicated in the supreme court of North Carolina, had been carried by writ of error to the Supreme Court of the United States, and that the said Supreme Court of the United States has held that the Federal courts are bound to follow the adjudications of the State courts in that case, and affiant is advised
26 by counsel, that if such had been the adjudication of said court the holders of one of the bonds in controversy having been parties to said action, questions involved in this cause and set forth in the bill of complaint as the plaintiffs' ground of complaint have been adjudicated, and the plaintiffs are estopped from denying that the bonds in controversy are invalid for want of authority in the said board of commissioners to issue them, and this defendant is further advised, informed and believes that after said action had been carried up by writ of error to said supreme court, and while it was there pending, the superior court of Wilkes county, in the exercise of its rightful jurisdiction, and to the end that the fund mentioned in the bill of complaint as collected under a special levy to meet the interest on the bonds in controversy and as being in the hands either of the defendant Call or this defendant, be protected and preserved, to wit: the orders of the court to be made in pursuance of the adjudication of the Supreme Court of the United States, made, upon petition in said action, an order, which was signed by O. H. Allen, judge *riding* — the judicial district in which Wilkes county is situated, and having rightful jurisdiction in the premises, by which order it was adjudged that Gordon Hackett, be appointed receiver to take charge of and hold under the direction of said superior court all funds that might be collected by

the tax collector of Wilkes county as a special tax to meet the interest on said bonds.

3.

And this defendant is advised, informed and believes, that, upon the making of said order, a copy of which certified under the seal of the clerk of the superior court is hereto attached, marked Exhibit A, the said superior court acquired jurisdiction to appoint a receiver and to control the said fund as collected and to hold the same subject to the action of said higher court, and this defendant therefore, being so advised, specially avers and pleads that this court has no jurisdiction because the said court, which is one of concurrent jurisdiction, had already assumed control of the said fund before the bill of complaint was filed.

And this defendant is further advised, informed and believes the questions and issues involved in this controversy and set up as a cause of action or the grounds of the suit in the bill of complaint, *has* already been adjudicated finally by the Supreme Court of the United States upon the hearing on said writ of error, in which action the holders of one of said bonds had made themselves parties and had invited all other holders of said bonds to join them
27 as parties defendants, and that said adjudication has been made since the said bill of complaint was filed, and this defendant specially avers and pleads that the plaintiffs are estopped by the said adjudication and will be finally estopped upon the rendition of a final judgment in the superior court of Wilkes county upon the coming down of the certificate therein, and this defendant prays the court to continue this cause until the coming down of said certificate, to the end that he may be enabled to properly plead as a defense that the questions and issues involved in this controversy have been so finally adjudicated and that the plaintiffs are estopped.

And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing in the said plaintiffs' said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

A. C. AVERY,
T. J. DULA,
FINLEY & GREEN, *Attorneys.*

To the answers of the respondents the complainants filed replications in the usual form.

The following is a copy of the bond upon which this bill is filed:

Six Per Cent. Bond.

(Copy.)

The County of Wilkes, State of North Carolina, is indebted to the bearer in the sum of one thousand dollars, lawful money of the United States, payable on the first day of October, 1913, with interest thereon from the first day of October, A. D. 1889, at six per cent. per annum, payable on the first days of April and October in each year, at Wachovia National Bank of Winston, North Carolina, on presentation and surrender of the respective coupons hereto attached, as they severally become due and payable.

This bond is one of a series *on* one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled "An act to amend the charter of the Northwestern North Carolina railroad for the construction of a second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county," and authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose on the 6th day of November, A. D. 1888, and by an order of the Board of Commissioners of Wilkes County made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes.

In witness whereof the chairman of the board of county
28 commissioners and the clerk of the said board have hereunto subscribed their names, and the said clerk has affixed the seal of said board of commissioners, this 1st day of October, A. D. 1889.

(Signed) R. W. COLVARD,
Ch'm'n Board of Commissioners of Wilkes Co.

(Signed) J. M. ADAMS,
[SEAL.] *Clerk Board Commissioners, Wilkes Co.*

The following is the ordinance of the convention of 1868, and also are the statutes, relied on by complainants as authority for the issuance of the bonds sued on :

CHAPTER 17.

An ordinance to incorporate the Northwestern North Carolina Railroad Company.

SECTION 1. Be it ordained by the people of North Carolina in convention assembled, and it is hereby ordained by authority of the same: That for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina railroad, between the town of Greensboro, in Guilford county, and the town of

Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic, for the space of ninety-nine years, and by that name may sue and be sued, plead and be impleaded, in any court of law and equity in the State of North Carolina; and may have and use a common seal, and shall be capable in law and equity of purchasing, holding, leasing and conveying estates, real and personal, and mixed, and acquiring the same by gift or devise, so far as may be necessary for the objects herein contemplated, and no further; and said company may enjoy all other rights and immunities which other corporate bodies may lawfully exercise, and may make all necessary by-laws and regulations for its government not inconsistent with the constitution and laws of the State of North Carolina and of the United States.

SEC. 2. Be it further ordained, That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and co[illegible] in shares of one hundred dollars.

SEC. 3. Be it further o[illegible]ined, That books of subscription to the capital stock of said company shall be opened by the following commissioners, to wit: I. G. Lash, J. A. Vogler, H. W. Fries, in the town of Salem; and Thomas J. Wilson, Joseph Masten, R. A. Wilson, in the town of Winston, and by such other persons and in such other places as the aforesaid commissioners may direct; and that ten days' notice of the opening of said books shall be given in one or more newspapers of this State; and, furthermore, that the said commissioners, or any four of them, may, at any time after
29 said books have been kept open for the space of thirty days, and the sum of thirty thousand dollars has been subscribed to the capital stock of said company and five per cent. paid thereon, have power to call together the subscribers to said stock for the purpose of completing the organization of said company; and the said subscribers shall be and are hereby declared incorporated into a company by the name and style of the Northwestern North Carolina Railroad Company; and the said company may, from time to time, receive other subscriptions to its capital stock as it may deem proper.

SEC. 4. Be it further ordained, That the company may hold annual meetings of its stockholders, and oftener if necessary, and at its organization and the annual meetings subsequent thereto, ten directors shall be elected to hold office for one year, or until their successors shall be elected; and any of said meetings shall have power to make or alter the by-laws of the company: Provided, that in all of such meetings of the stockholders a majority of all the stock subscribed shall be represented in person or by proxy, which proxy shall be verified in the manner prescribed by the by-laws of the company; and each share thus represented shall be entitled to one vote on all questions; and that it shall be the duty of the

directors of the company to elect one of their own number as president of said company, and to fill all vacancies in their board.

SEC. 5. Be it further ordained, That after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad, when completed, shall constitute its first division: Provided, that if the distance from the nearest section to the towns of Winston and Salem be less than five miles, the same shall be considered a section.

SEC. 6. Be it further ordained, That said company shall have the same power to call for and enforce the payment of stock subscribed as was heretofore granted to the North Carolina Railroad Company, by their charter of incorporation; and shall have power to condemn land for the use of the company, when a contract of purchase cannot be made with the owner thereof, to the same extent and in the same manner and under the same rules, regulations and restrictions as the said North Carolina Railroad Company were authorized to do by their act of incorporation.

SEC. 7. Be it further ordained, That all contracts made and entered into by the president or superintendent of the company, whether with or without seal, shall be binding upon the company; and the president shall, under the instruction of the board of directors, issue certificates of stock to the stockholders, which shall be transferable in the manner prescribed by the by-laws of the company.

SEC. 8. Be it further ordained, That whenever the president and chief engineer of said company shall certify to the governor of the State that the grading of any of the sections of said road, as mentioned in section 5 of the ordinance, is completed and ready for the superstructure, he shall direct the public treasurer of the State to loan in behalf of the State to the said company the sum of fifty thousand dollars in coupon bonds; and in like manner the governor will direct similar loans to be made to the company upon the completion of the grading of each and every section, until the first section is graded entire; and said company shall set aside the receipts of the road over and above its annual expenses, as a sinking fund to pay the said debts and interests, the whole amount of said debt and interest to be paid before the said company shall order any dividends on the stock of the company; and that said sinking fund so produced shall be semi-annually paid into the public treasury.

SEC. 9. Be it further ordained, That no part of said loan or bonds shall be delivered to said company until the president and directors thereof shall execute and deliver to the governor of the State a mortgage on the entire road and its property, conditioned to save the State harmless against the loss of both principal and interest of said loan.

SEC. 10. Be it further ordained, That the coupon bonds loaned, as aforesaid, shall be signed by the governor, countersigned by the treasurer and sealed with "the great seal of the State," bearing six per cent. interest, the principal payable at the end of thirty years from the date thereof, and the coupons for the interest payable semi-annually in such form as the public treasurer may direct.

SEC. 11. Be it further ordained, That the company may have the exclusive right of transporting persons and freight upon said
31 road at such rates of charges as the board of directors may fix, and may have power to farm or lease the same to any person or persons or corporation.

SEC. 12. Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.

SEC. 13. Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia.

SEC. 14. Be it further ordained, That this ordinance shall be in force from and after its passage.

Ratified this 9th day of March, A. D. 1868.

CALVIN J. COWLES, *President.*

T. A. BYRNES, *Secretary.*

EXHIBIT "B."

An act ratifying and confirming the charter of the Northwestern North Carolina Railroad Company.

SECTION 1. The General Assembly of North Carolina do enact that, an ordinance entitled "An ordinance to incorporate the Northwestern North Carolina Railroad Company," ratified the 9th day of March, A. D. 1868, be, and the same is hereby re-enacted, ratified and confirmed, and all acts and things heretofore done under the provisions of said ordinance are hereby ratified and confirmed.

SEC. 2. That all the rights, powers and authorities conferred or purporting to be conferred by said ordinance incorporating the Northwestern North Carolina Railroad Company on the justices of the peace of Forsyth county, or of the county court of said county be, and the same are hereby conferred on the commissioners of said county.

SEC. 3. That the commissioners of the county of Forsyth are hereby invested with full powers and authority to levy from
32 time to time, such tax as may be sufficient to pay the subscriptions made by said county to the capital stock of the

Northwestern North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created by said county in borrowing money to pay such subscription stock.

Ratified the 11th day of August, A. D. 1868.

Sections 1996 to 2000 of the code are as follows:

SEC. 1996. "The boards of commissioners *of the several counties shall have power to subscribe stock* to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

SEC. 1997. "The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition this shall be entered of record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, *the board of county commissioners, through their chairman, shall have power to subscribe* the amount of stock proposed by them, and submit to the people, subject to all rules, regulations and restrictions of other stockholders in such company or companies: *Provided*, That the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper."

SEC. 1998. "All election- ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the General Assembly. The votes shall be compared by *the boards of county commissioners*, who shall make a record of the same."

SEC. 1999. "In case *the county* shall subscribe the amount proposed in bonds, *the board of commissioners shall have power* to fix the rate of interest, not to exceed the rate of eight per cent., when the interest on said bonds shall be payable, and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds."

SEC. 2000. "The taxes authorized by the three preceding sections to be raised for the payment of interest or principal shall be collected by the *sheriff in like manner as other State taxes*, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this chapter."

33 CHAPTER 43.

An act to amend the charter of the Northwestern North Carolina railroad for the construction of a second division from the town of Winston and Salem, in Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's factory, Caldwell county.

The General Assembly of North Carolina do enact:

SECTION 1. That section thirteen of chapter seventeen of the ordinance of the convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight, be amended by adding the words " and one of which shall be constructed from the town of Winston and Salem, up the valley of the Yadkin by the way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell, which branch shall be known as second division."

SEC. 2. That said ordinance be amended by inserting a new section between sections thirteen and fourteen, to read as follows: "That the penitentiary board is authorized and directed to farm out to (the) president and directors of said company, for the purpose of constructing the second division of said road, two hundred able-bodied convicts to work on the construction of said railroad, but the said convicts shall be at all times under the supervision and control, as to their government and discipline, of a supervisor, who shall be appointed by the governor upon the recommendation of said railroad company; provided, that there shall be an estimate made of the net value of the labor done by said convicts on the road of said company to be fixed on a just and equitable basis by the president of said company and a person appointed by the governor on the part of the State, and the net value of labor shall be a first lien on all property and franchises of said second division of said railroad. Provided further, that the State shall not be at any expense for the feeding, clothing or other care of said convicts."

SEC. 3. Nothing in this act shall be construed to interfere with the convicts assigned to any road in which the State has an interest.

SEC. 4. That any township or city, town, county, or other
34 municipal corporation of this State shall have power and authority to subscribe for and take any number of shares of capital stock of said company that a majority of the voters of such township or city, town, county or other municipal corporation may elect to take therein. That upon (the) request of twenty resident- and tax-payers of any such township or city, town, county, or other municipal corporation of this State, the municipal corporation (and in case of township, the justices of the peace of such township) shall determine the number of shares in the said company proposed to be taken by such township or city, town, county or other municipal corporation, and shall appoint a day on which an election shall be held in such township or city, town, county, or other municipal corporation, in the manner prescribed by law for holding elections, at which election the legally qualified voters of such township or city, town, county, or other municipal corporation, shall be entitled to vote for or against such subscription, the

legally qualified voters favoring such subscription to vote ballots written or printed "railroad," those opposing such subscription to vote "no railroad." The election herein provided for shall be held at the usual voting places for such townships or cities, towns, counties, or other municipal corporations (and in case of townships, by justices of the peace of such townships), in the same manner that persons are appointed for holding other elections. And the returns thereof shall be made and the result thereof announced as in other elections prescribed by law. Provided, that in case of townships the justices of the peace of such township, for carrying out the purpose of this act, shall be vested with all the powers vested in the boards of commissioners and justices of the peace of counties as to the manner of appointing the persons to hold elections, and so forth, by law for the purpose of holding other elections, and townships shall have corporate powers for the purpose of this act. If the result of any such election shall show that a majority of the qualified voters of any township or city, town, county, or other municipal corporation, favor the taking of the amount of stock so voted for in such election, then the authorities who, by this act, are empowered to determine what amount of stock shall be taken shall subscribe the amount of stock so voted for in said company, and shall have power to levy and collect taxes for that special purpose to pay for the said stock in installments as the same may become due, or, in case it shall not be deemed best to collect taxes to pay by taxation such subscription for stock, then such township, or city, town, county or other municipal corporation, shall have power to issue bonds for the purpose of raising money to pay for such subscription, and shall provide for the payment of interest upon such bonds, and also for the payment of said bonds when they become due. Provided, however, that any township, county or other corporate authorities who shall issue any bonds or issue any obligations in behalf of this road shall be required to commence as soon as said obligations are assumed to provide a sinking fund that shall be sufficient to liquidate said bonds or obligations at maturity; provided further, that nothing in this charter shall be construed to exempt said railroad from taxation.

SEC. 5. That this act shall be in force from and after its ratification.

Read three times in the General Assembly and ratified the 20th day of February, A. D. 1879.

An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

The General Assembly of North Carolina do enact:

SECTION 1. That it shall be lawful for the Northwestern North Carolina Railroad Company to extend and construct its line of road, or a branch thereof, to commence at or near Winston, in the county of Forsyth, through the counties of Forsyth, Davidson, Yadkin, Davie, Rowan and Iredell, or any or either of them, to Statesville, or some other point on the Western North Carolina railroad, and may build and operate additional branches thereto, or from its

present main line to any important mines or manufactories in any of said counties, or counties adjacent to them; provided, that nothing contained in this act shall operate to be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland railroad from Danville, Virginia, via Winston, Forsyth county, and Mocksville, Davie county, to some point on the Atlantic, Tennessee, and Ohio railroad in Iredell county; but said company is hereby authorized to build said road under the organization and consolidation heretofore made by the stockholders and directors of the consolidated line composing the North Carolina extension.

SEC. 2. That to provide the means in whole or in part for this purpose, the said company may receive subscriptions in money, labor, property, or otherwise, as the said company may agree, and may mortgage or otherwise pledge its property and franchises and the work constructed, or to be constructed, with the franchises and rights connected therewith.

SEC. 3. That any corporation, county, city, town or township interested therein, may subscribe to stock for said purpose, or otherwise contribute to such work in such manner and in such amount as shall be determined by the proper authorities of such corporation, county, city, town, or township, and agreed on with the said Northwestern North Carolina Railroad Company.

SEC. 4. This act shall be in force from and after its ratification.

In the General Assembly, read three times and ratified this the 2nd day of March, A. D. 1881.

36 The following are the material and pertinent sections of the act of 1852 referred to in the ordinance of 1868, the charter of the North Western North Carolina Railroad Company:

Chapter 136 of the Laws of North Carolina, session 1852.

SEC. 33. Be it further enacted That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided.

SEC. 34. Be it further enacted That the corporate authorities of such town, of the justices of the peace of such county, a majority of the justices of the county concurring, to make an order requiring the constable of such town and the sheriff of such county, at such time and on such notice as they shall direct, to open a poll and take the sense of the voters of such town qualified to vote for town officers, and of the voters of such county qualified to vote for members of the house of commons of the General Assembly, whether the officers of said town and the justices of the peace of said county shall subscribe to the stock of such company for such sum as the order shall propose, and the constable shall make return of the number against it, and the sheriff shall, in like manner, make return as to the vote in his county to the first court thereafter, to be

held for such county and it shall be the duty of the sheriff to notify each justice of said county to attend at the court-house to which he may make his returns of said poll.

SEC. 35. Be it further enacted That if upon the return of such constable and of such sheriff it shall appear that a majority of the qualified voters of such town, and by the return of the sheriff that a majority of the qualified voters of such county voting upon the question are in favor of the subscription, the corporate authorities of such town and the justices of such county shall appoint an agent to make the subscription in behalf of such town and county, to be paid for in the bonds of such town and county, and on such time as shall be agreed on by said town officers and the justices of such county.

SEC. 36. Be it further enacted That for the purpose of paying the quotas on said stock as may be called for or the installments of such subscriptions as may fall due, the town authorities and the justices of the county shall have power to appoint an agent or agents to negotiate a loan or loans for and in the name of such town and county; and it shall be the duty of the authorities of such town and the justices of such county to levy such taxes annually on the persons, lands and other personal property within such town and county as may be sufficient to pay the amount of such loan or loans and the interest thereon, and as said town authorities and the justices of such county shall deem necessary and proper, and to make such order or orders as shall be deemed necessary for the due collection and payment of the same; and the stock subscribed on behalf of such town and county shall stand pledged for the payment of the loan thus authorized to be contracted.

SEC. 37. Be it further enacted, That the right to the stock in the company hereby authorized to be subscribed, shall vest in the town and county making such subscriptions; and the corporate authorities of said town and the justices of such county shall have power from time to time to appoint a proxy to represent the stock in the meeting of the stockholders of the company, and also an agent to collect the dividends of such stock, and when collected, to apply the same to payment of the bonds and interest negotiated as aforesaid.

38 *Agreement of Counsel as to Record and Opinion.*

Circuit Court of the United States, Western District of North Carolina, Fourth Circuit. In Equity.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and J. H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Appellants,
vs.
W. N. COLER AND COMPANY, Appellees.

Agreement of Counsel.

Counsel for the complainants, Coler and Company, having offered in evidence on the hearing the printed transcript of record lately filed in the Supreme Court of the United States, in the case of J. M. Turner and J. M. Welburn, plaintiffs in error, *versus* The Board of Commissioners of Wilkes County, to show a discrepancy in the language of the opinion of the court sent up as a part of said record, and the opinion of the court as published in the North Carolina Reports, — is now agreed by counsel that the following language appears in said opinion as printed in said transcript of record, to wit:

"Enough appears to indicate, what is common knowledge, that the railroad does not touch the county of Wilkes, and that the stock for which these bonds were issued has been swept away in the maealsstrom of corporate reorganization," and that in lieu of said language the following sentence is substituted in the opinion of the court in said action, as published on page 326 of volume 123 of the N. C. Report-, to wit:

"Enough appears to indicate, what is common knowledge, that the stock for which these bonds were issued has been swept away in the maealstrom of corporate reorganization."

It is further agreed by counsel to constitute a part of the record on appeal in the above-entitled cause:

1st. That an action was brought by J. M. Turner, E. Wallace and other-, tax-payers of Wilkes county, *versus* The Richmond and Danville Railroad Company, The Northwestern North Carolina Railroad Company and The Board of Commissioners of Wilkes County, returnable to the fall term of the superior court of Wilkes county, A. D. 1893, for the purpose of compelling defendants by mandamus to build and construct the Northwestern North Carolina railroad across the Yadkin river from North Wilkesboro to Wilkesboro, a distance of about one mile, and that the plaintiffs in said action submitted to judgment of nonsuit which was rendered at the fall term 1895, of said superior court.

2nd. It is further admitted and agreed between counsel that it may appear as a part of the record on appeal that an action was brought by Jessie M. Douglas and others as plaintiffs against The Northwestern North Carolina Railroad Company and others as defendants, returnable to the superior court of Guilford county at the June term, 1888, for the purpose of preventing and restraining the Northwestern North Carolina Railroad Company from issuing

mortgage bonds constituting a lien upon the completed road of said company to *and* in the extension of its line.

3rd. That when the franchise and property of the Northwestern North Carolina Railroad Company was offered for sale under a decree of foreclosure made by the circuit court of the United States by the special master named in said decree at Winston, in the year 1894, R. M. Douglas, the justice who delivered the opinion of the court contained in said transcript, was present and for and on behalf of his wife, as a stockholder, forbade said sale in writing, and appeared before the circuit judge and opposed the granting of the decree confirming said sale.

It is agreed that the certified extracts from the journals of the legislative house of North Carolina, contained in the record of the proceedings in the superior court of Wilkes county and in the supreme court of North Carolina, filed as an exhibit to the supplemental answer, present a correct history of legislative action in reference to the amendments to the charter of the Northwestern North Carolina Railroad Company, ratified, respectively, at the
39 sessions of said legislature in 1879 and 1881, and that the copies of said legislative proceedings offered at the hearing need not be sent up, except the extracts from the journals of the house of representatives at the special session of 1868, in reference to the private act ratified August 11th, 1868, which, with the other said amendments is filed as an exhibit to the complaint.

It is further agreed that the opinion of Judge Purnell as published in the Federal Reporter (volume 90) filed in Union Bank *vs.* Town of Oxford and which is to be adopted as the opinion in this case, need not be sent up as a part of the record.

It is further agreed, that the affidavits contained in the exhibit filed with the supplemental answer be considered as offered at the hearing.

CHAS. PRICE,
Sol. — Complain'ts.
A. C. AVERY,
Sol. for Respondents.

Transcript of Journals—Senate and House.

HOUSE OF REPRESENTATIVES,
TUESDAY, *January 14th*, 1879.

By Mr. York, a bill to amend the charter of the Northwestern North Carolina Railroad Company for the construction of a second division from Winston and Salem, Forsyth county, up the Yadkin River valley by Wilkesboro to Patterson, Caldwell county.

Referred to the committee on railroads, post-roads, etc.

HOUSE OF REPRESENTATIVES,
SATURDAY, *January 18th*, 1879.

Mr. Vaughan, from the committee on railroads, post-roads, etc., reports on H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, for the construction of a second divison

from the towns of Salem and Winston, Forsyth county, up the valley of the Yadkin river, by Wilkesboro to Patterson, Caldwell county, recommending its passage, with the adoption of an accompanying amendment.

HOUSE OF REPRESENTATIVES,
MONDAY, *January 20th*, 1879.

On motion of Mr. York,

H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, W. C. R. R., for the construction of a second division from Winston, Forsyth county, up the Yadkin valley, by Wilkesboro to Patterson, in Caldwell county, is taken up for consideration.

The question is on the amendment suggested by the committee, and it is adopted; and as amended, the bill passes its second reading; and then, on motion of Mr. York, is referred to the committee on internal improvements, with order to be printed, and it is ordered by the house.

HOUSE OF REPRESENTATIVES,
THURSDAY, *January 30th*, 1879.

Mr. York, on the part of the committee of internal improvements, submits the following reports on —; and,

40 H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, etc., recommending its passage with amendments proposed.

HOUSE OF REPRESENTATIVES,
SATURDAY, *February* 1, 1879.

H. B. 103, an act to amend the charter of the Northwestern North Carolina railroad, etc., is taken up on its third reading.

Mr. York submits a new section to be added to the bill by way of amendment, which is accepted.

Mr. Richardson submits the following amendments, which is accepted:

"Provided, that nothing in this charter shall be construed to exempt said road from taxation."

Mr. Carter, of Buncombe, submits an amendment, which, after discussion, is withdrawn.

The question is then put on the amendments offered by the committee, and they are accepted; and the question recurs on the passage of the bill.

Mr. Powers sends forward the following amendment:

Amend by inserting in the proper place, "Provided, however, that any county, township, or other corporate authorities who shall issue any bonds or assume any obligations in behalf of this road shall be required to commence as soon as said obligations are assumed, to provide a sinking fund that shall be sufficient to liquidate said bonds or obligations at maturity."

Mr. Christmas sends forward the following amendment:

"Strike out in line 6 the words, 'a person' and insert 'two persons in the eastern part of the State and one in the western part;'

and insert in line 17 between the words 'toll' and 'who are not in any respect interested in said work.'"

The question is put on the amendment, and it is rejected.

Mr. Turner sends the following amendment:

Strike out "convict and convict labor wherever it occurs in the bill."

The question is put on this amendment and it is rejected; and the question recurs on the passage of the bill; and it passes by the following vote, and is ordered to be engrossed and transmitted to the senate:

Ayes—Messrs. Amis, Anderson, Angier, Ardrey, Armstrong, Bateman, Burhod, Bingham, Bizzell, Blocker, Bonner, Bost, Brown
41 of Yadkin, Brison, Buchan, Cale, Carter of Buncombe, Carter of Yancey, Carrol, Carson, Clark, Colwell, Council, Covington, Davis of Haywood, Deans, Dickson, Dunn, Ellison, English, Etheridge, Ferrell, Foard, Foster, Fulcher, Goldston, Grant, Harrill, Harrison, Hewett, Hines, Holt, Jones, Johnson of Davie, Lamb, Leatherwood, Lockhart, Lowrie, Lutterlow, Meares, Miller, McLean, Normant, Oliver, Orchard, Packston, Pettipher, Powers, Rawley, Reed of Macon, Richardson of Columbus, Robertson, Smith, Taylor, Turner, Venable, Wheeler, Wimberley, York, Young—total ayes, 72.

Nays—Carter of Warren, Christmas, Henderson, Horton, Osborne, Wynne—nays, 6.

HOUSE OF REPRESENTATIVES,
THURSDAY, *February 20th*, 1879.

The committee on enrolled bills reports as correctly enrolled:

An act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a second division from the towns of Winston and Salem, Forsyth county, up to the Yadkin valley to and by Wilkesboro, Patterson's factory, Caldwell county.

SENATE CHAMBER, *February 4th*, 1879.

A message was received from the house, —, transmitting for concurrence:

H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a division from the towns of Salem and Winston, up the Yadkin valley by Wilkesboro, to Patterson's factory, in Caldwell county.

Referred to the committee on internal improvements.

SENATE CHAMBER, *February 11th*, 1879.

From the committee on internal improvements:

By Mr. Brower, H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad, for the construction of a second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county, recommending it do pass.

On motion of Mr. Nicholson, H. B. No. 103, S. B. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, in Caldwell county, was taken up on its second reading as passed—ayes 33, noes 5, as follows:

Those voting in the affirmative were:

Messrs. Alston, Black, Bledsoe, Brower, Bryan of Duplin, Bryan of Pender, Bull, Caldwell, Dancey, Davidson, Dortch, Eppes, Graham of Lincoln, Graham of Montgomery, Harriss, Henderson, Holleman, Hoyle, Leach, Lyon, Matheson, Merritt, Mitchell, Moye, Nicholson, Ormand, Redwine, Ross, Scales, Stuart, Taylor, Wardwell, Ward—33.

Those voting in the negative were:

Messrs. Alexander, Austin, King, Mebane, Williamson—5.

SENATE CHAMBER, *February 12th*, 1879.

H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a second division for the towns of Winston and Salem, in Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's factory, in Caldwell county, passed its third reading—ayes 35, noes 1, as follows:

Those voting in the affirmative were:

Messrs. Alston, Bledsoe, Brower, Bryan of Duplin, Bryan of Pender, Bull, Bynum, Caldwell, Dancey, Dortch, Eaves, Eppes, Erwin, Everett, Graham of Lincoln, Harris, Henderson, Holleman, Hoyle, King, Leach, Lyon, Matherson, Mitchell, Nicholson, Ormand, Redwine, Respass, Rose, Scales, Stuart, Taylor, Waddell, Waldo, Ward—35.

Mr. Williamson voted in the negative.

SENATE CHAMBER, *February 20th*, 1879.

The committee on enrolled bills reported as correctly enrolled:

H. B. 103, S. B. 378, an act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a second division from the towns of Salem and Winston, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county.

43 SENATE CHAMBER, *January 21st*, 1881.

Bills and resolutions were introduced, read the first time, and disposed of as follows:

By Mr. Tucker, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its railroad, and to build branches thereof.

Referred to the committee on internal improvements.

Senate Journal.

JANUARY, 25TH, 1881.

From the committee on internal improvements:

By Mr. York, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road, and to build branches thereof, recommending it do pass.

Calendar.

Senate Journal.

JANUARY 29TH, 1881.

Bills and resolutions upon the calendar were taken up and disposed of as follows:

S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road, and to build branches thereof.

On its second reading, Mr. Scott, of New Hanover, moves the bill be postponed until Thursday next. Lost.

Bill then passed its second reading—ayes 26, noes — as follows:

Those voting in the affirmative were:

Messrs. Bernard, Burwell, Carr, Cunningham, Davidson, Dever, Dickey, Dortch, Eaves, Finger, Hanes, Hooper, Jenkins, Jones, King, Lockhart, Mebane, Newland, Oats, Pridgen, Richardson, Scott of New Hanover, Shears, Staples, Pucker, York—26.

The Calendar.

SENATE CHAMBER, *February 5th*, 1881.

S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road and to build branches thereof, on its third reading.

Mr. Glenn moves to amend:

Add to the first section the following: "Provided that
44 nothing contained in this act shall operate or be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland railroad from Danville, Virginia, via Winston, Forsyth county, and Mocksville, Davie county, to some point on the Atlantic, Tennessee and Ohio railroad, in Iredell county: but said company is hereby authorized to build said railroad under the organization and consolidation heretofore made by the stockholders and directors of the consolidated line, comprising the North Carolina extension."

Mr. Tucker moves to amend the amendment:

"Strike out all after the words 'Iredell county' in line 12." Lost.

Mr. Glenn's amendment was adopted.

Bill then passed its third reading, ayes 34, as follows:

Messrs. Battle, Blue, Burwell, Carr, Davidson, Dickey, Dortch, Faison, Finger, Foil, Glenn, Gudger, Hampton, Hanes, Harper, Harris, Jenkins, Jones, Manning, Mebane, Merritt, Newsom, Oats, Parish, Richardson, Scott of New Hanover, Scott of Rockingham,

Spears, Spruill, Stowe, Tucker, Whitaker, Williamson of Davie and Wynne—34.

SENATE CHAMBER, *February* 11*th*, 1881.

From the committee on engrossed bills:

By Mr. Spears, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

SENATE CHAMBER, *March* 2, 1881.

From the committee on enrolled bills:

S. B. 224, H. B. 634, an act to authorize the Northwestern North Carolina Railroad Company to extend its road and build branches thereof.

HOUSE OF REPRESENTATIVES,
FRIDAY, *February* 11*th*, 1881.

A message from the senate is announced, transmitting S. B. 224, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereof.

S. B. 224 is referred to the committee on corporations.

HOUSE OF REPRESENTATIVES,
SATURDAY, *February* 12*th*, 1881.

45 *Reports of Committees.*

—— favorably on ——; and S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

HOUSE OF REPRESENTATIVES,
MONDAY, *February* 21*st*, 1881.

S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

HOUSE OF REPRESENTATIVES,
TUESDAY, *February* 22, 1881.

The morning hour having expired, on motion of Mr. Carter, the vote by which S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereof, is reconsidered; and the bill is placed on the calendar.

HOUSE OF REPRESENTATIVES,
THURSDAY, *February* 24*th*, 1881.

The calendar is taken up, and

S. B. 224, H. B. 634, a bill to authorize the North Western North Carolina railroad to extend its road and build branches, is put on its third reading.

Mr. Carter offers the following amendment:

Amend by adding to section 3 the following words: "Provided, that nothing in this act contained shall be construed to authorize

or empower the Western North Carolina Railroad Company to lend its credit, or otherwise in any manner contribute to the work or any part thereof contemplated in this act."

The amendment is adopted; and as amended, the bill passes its third reading, and is ordered to be sent to the senate with engrossed amendments.

HOUSE OF REPRESENTATIVES,
WEDNESDAY, *March 2d*, 1881.

Mr. Green of Orange, from the committee on enrolled bills, reports the following bill to have been correctly enrolled: An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

46 *Certificate of Secretary of State.*

NORTH CAROLINA,
Department of State.

RALEIGH, N. C., *January 15th*, 1897.

I, Cyrus Thompson, secretary of state, do hereby certify that the foregoing and annexed nine sheets contain a full and accurate transcript of the journals of the senate and house of representatives of the State of North Carolina, for the session of the General Assembly in the year 1879, of so much of said journal as relates to H. B. 103, S. B. 378, a bill to be entitled An act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county, the title, as published, of chapter 43, Public Laws of the Session of 1879; and of so much of the journals of senate and house of representatives of the State of North Carolina, for the session of the General Assembly in the year 1881, as relates to S. B. 224, H. B. 634, a bill to be entitled An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof, the title, as published, of chapter 162 of Public Laws of the Session of 1881.

Done in office at Raleigh, this the 15th day of January, A. D. 1897.

[SEAL.] CYRUS THOMPSON,
Secretary of State.

Extracts from Journal of House of Representatives, Filed as Exhibit to Bill of Complaint.

The following extracts from the journal of the house of representatives of the General Assembly of North Carolina were offered with the entire printed journal, to show that the act of August 11, 1868, which is one of the exhibits attached to the bill of complaint, failed to pass in the manner prescribed by the constitution of North Carolina, article 2, section 14:

"A message was received from the senate concurring in the amendment to the bill in relation to marriage licenses."... .....
....
"Also a message transmitting a bill ratifying and confirming the charter of the Northwestern North Carolina Railroad Company."..
....
"On motion of Mr. Vest, the senate bill to ratify the charter of the Northwestern North Carolina Railroad Company was taken up, and referred to the finance committee."..... ....
... ...
"The senate bill to ratify the charter of the Northwestern North Carolina Railroad Company passed its final reading."... .....
....
"Mr. Rhodes, from the committee on enrolled bills, reported as correctly enrolled the following, which were signed by the speaker and transmitted to the senate:
"A bill ratifying the charter of the Northwestern North Carolina Railroad Company."
The foregoing were the only entries in reference to the passage of the said act contained in the official printed journal, and it was not denied that it failed to pass in accordance with art. 2, sec. 14.

Endorsed: Filed in this office, April 17, 1890. Sam'l L. Trogdon, clerk.

47 United States Circuit Court, Western District of North Carolina, Greensboro, N. C., April 13th, 1890. In Equity.

W. N. COLER AND COMPANY, Complainants,
vs.
THE BOARD OF COMMISSIONERS OF WILKES CO. and Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer, and John H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Respondents. } Final Decree.

This cause coming on to be heard upon the bill, answers, replications and former orders, exhibits and other evidence in the cause, and being debated by counsel, the court doth declare: that the bonds issued by the county of Wilkes in aid of the building of the Northwestern North Carolina railroad, mentioned in the bill, are valid obligations of the county of Wilkes, and were purchased by the complainants for value, and that they are the lawful holders of the same. The court doth further declare that the respondents, Clarence Call, ex-sheriff and *ex officio* ex-treasurer, and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, are the lawful trustees of the said bondholders, and hold the sum of thirteen thousand dollars, $13,000, mentioned in the bill as such trustees, under and by virtue of the law and orders of the Board of Commissioners of Wilkes County, for the benefit of said bondholders, and for the sole purpose of paying off and discharging the interest due on the said bonds, as set out in the bill. And now it is therefore ordered and decreed that Kerr Craige be, and is, appointed a receiver

for said sum of thirteen thousand dollars; and that the said Call and Johnson, ex-treasurer and treasurer, as aforesaid, pay over to him forthwith the said sum or any such part of the same as may be in their hands, and that the said Board of Commissioners of Wilkes County are enjoined from in any manner interfering with the execution and performance of this decree. It is further ordered and decreed that the said receiver, Kerr Craige, enter into bond in the sum of twenty thousand dollars, the same to be approved by this court, for the faithful performance of the duties of his receivership.

It is further ordered and decreed that the said receiver hold the said sum of thirteen thousand dollars until the further order of this court.

It is further ordered and decreed that the clerk of this court certify this decree to the said receiver and to the respondents, to wit: The Board of Commissioners of Wilkes County, and the said ex-treasurer and treasurer, Call and Johnson.

THOS. R. PURNELL,
United States Dist. Judge, Presiding in the Circuit Court of the Western Dist. of N. C., by Designation of the Circuit Judge of this the 4th Circuit of the United States and Sec. 906, R. S.

Endorsed: Filed in this office, Apr. 14th, 1899. Sam'l L. Trogdon, clerk.

48 Upon the hearing on the circuit, the decree as above set out was entered in favor of the complainants. Whereupon the suit was taken by appeal to this the circuit court of appeals for the fourth circuit before the undersigned, and said court desiring for its proper decision the instruction of the Supreme Court of the United States concerning certain questions or propositions of law arising in said suit:

Now, therefore, we, the undersigned, do hereby certify said questions or propositions of law to the Supreme Court of the United States for instruction, as aforesaid:

First. Whether, upon the averments of the bill of complaint, answers, replications, orders, exhibits, and other evidence, and matters and things recited herein, the circuit court of the United States was bound in passing upon this case by the decisions of the supreme court of North Carolina in the following cases:

Commissioners of Wilkes County *vs.* Clarence Call *et al.*, 123 North Carolina Report, 308;
Bank *vs.* Commissioners, 119 N. C. Rep., 214;
Commissioners *vs.* Snuggs, 121 N. C. Rep., 394;
Radman *vs.* Washington, 122 N. C. Rep., 39;
Commissioners *vs.* Payne, 123 N. C. Rep., 432;

considered in connection with prior decisions of said court and the following provisions of the constitution of said State:

Article 2, sections 14 and 16, and article 5, sections 1, 4, 6, and 7, and article 7, section 7.

49 Second. Whether, if the bonds and coupons in question were issued, put in circulation, and came to the hands of complainants, appellees, in due course of trade, for valuable consideration and without notice, and if there were at that time no decision of the supreme court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds.

Third. Whether there was any decision adverse to the validity of these bonds or identical bonds or any construction of the constitution or law of North Carolina which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice other than such notice as the parties are assumed to have of existing provisions in the constitution and statutes of the State of their invalidity.

50 As witness our hands this 17th day of November, A. D. 1899.

CHARLES H. SIMONTON,
Circuit Judge Presiding, Fourth Circuit.
JOHN PAUL,
District Judge, Western District of Virginia.
WM. H. BRAWLEY,
District Judge, District of South Carolina.

Clerk's Certificate.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the aforegoing is a true copy of the original certificate of questions or propositions of law to the Supreme Court of the United States in the therein-entitled cause filed and now remaining of record in the said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the United States circuit court of appeals for the fourth circuit, at Richmond, on this 5th day of December, A. D. 1899.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th C't.

Endorsed on cover: File No., 17,585. U. S. C. C. of appeals, 4th circuit. Term No., 471. The Board of Commissioners of Wilkes County *et al.*, appellants, *vs.* W. N. Coler & Company. (Certificate.) Filed December 15th, 1899.

A/A 471 JAN 9425

UNITED STATES OF AMERICA.

Notice of motion to advance.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Filed Jan. 13, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, *Appellants*,

Versus

W. N. COLAR AND COMPANY, *Appellees*.

To the Hon. Charles Price, Attorney for the Appellees:

You are hereby notified that on Monday, February 5th, A. D. 1900, or as soon thereafter as it can be heard, a motion will be made in the Supreme Court of the United States, in the cause entitled Commissioners of Wilkes County and Others *versus* W. N. Colar and Company:

1st. To advance the hearing of the said cause, for the reasons that it involves questions of public interest, and as to which there has been a conflict between the rulings of the Supreme Court of the State of North Carolina and the Federal Court of the two circuits embracing said State.

2nd. To allow the counsel for the Commissioners of Stanley County in a cause wherein the mandate has been held, after a decision favorable to said Commissioners, to await the opinion of the Supreme Court of the United States upon questions submitted for instruction in the above entitled cause, and to allow further time, or extend the time for the hearing beyond that prescribed by the rules of the Court for the benefit of said counsel.

A. C. AVERY,
Attorney for Appellants.

Dated January 12th, A. D. 1900. Service accepted this the 13th day of January, A. D. 1900.

CHARLES PRICE.

No. xxx 167

JAMES I 19426

Motion to Advance &c. 471

UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Filed Jan. 13, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, *Appellants*,

Versus

W. N. COLAR AND COMPANY, *Appellees*.

Come now the appellants, by their counsel appearing in that behalf, and move the Court:

1st. To advance the hearing of the said cause, for the reasons that it involves questions of public interest, and as to which there has been a conflict between the rulings of the Supreme Court of the State of North Carolina and the Federal Court of the two circuits embracing said State.

2nd. To allow the counsel for the Commissioners of Stanley County in a cause wherein the mandate has been held, after a decision favorable to said Commissioners, to await the opinion of the Supreme Court of the United States upon questions submitted for instruction in the above entitled cause, and to allow further time, or extend the time for the hearing beyond that prescribed by the rules of the Court for the benefit of said counsel.

A. C. AVERY,
Counsel for Appellants.